Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-839

ROBERT P. WHALEN, as Commissioner of Health of the State of New York,

Appellant,

—against—

RICHARD ROE, an Infant, by ROBERT ROE, his Parent; JOHN DOE, an Infant, by MARY DOE, his Parent; JAMES MOE, an Infant, by MICHAEL MOE, his Parent; JANE POE, MATTHEW T. BRODY, ISRAEL L. SCHMIERER and EMPIRE STATE PHYSICIANS GUILD, INC.,

Appellees,

—and—

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG and THE AMERICAN FEDERATION OF PHYSICIANS AND DENTISTS,

Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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SUPREME COURT OF THE UNITED STATES

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ROBERT P. WHALEN, as Commissioner of the State of New York,

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- against -

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Appellees,

- and -

GEORGE PATIENT, et al.,

Intervenor-Appellees.

On Appeal from the United States District Court for the Southern District of New York

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MOTION TO AFFIRM

Intervenor-Appellees George Patient, et al., pursuant to Rule 16 of the Rules of this Court, move that the final judgment and decree of the District Court be affirmed on the grounds that the questions raised by the decision below are so insubstantial, and the decision below so plainly correct, as not to warrant further argument.

Preliminary Statement

This appeal is from a final judgment of a three-judge

court in the United States District Court for the Southern District of New York entered on October 9, 1975 which declared unconstitutional New York Public Health Law §§ 3331 (b), 3332(a) and 3333(4) insofar as they require the centralized filing of the names of patients receiving Schedule II prescription drugs. The opinion of that court is reproduced as Appendix "A" to the Appellant's Jurisdictional Statement.

Statute Involved

New York Public Health Law (P.H.L.) §§ 3331(6), 3332(2)(a) and 3333(4). These provisions require filing with the state all prescriptions for an entire category of drugs, which prescriptions must contain the patient's name and address. These provisions are:

P.H.L. § 3331(6):

> "6. A practitioner dispensing a substance which may be prescribed only upon an official New York state prescription must at the time of such dispensing prepare an official New York state prescription in the manner set forth in subdivision two of section thirty-three hundred thirty-two of this article. The practitioner shall retain one copy for five years and shall file

> the original and one copy with the department by not later than the fifteenth day of the next month following the month in which the substance was delivered. This requirement shall not apply to the dispensing by a practitioner pursuant to section thirty-three hundred fifty-two of this article."

P.H.L. § 3332(2)(a):

> "2. Such prescription shall be prepared in triplicate, writen [sic] in ink, indelible pencil or, apart from the practitioner's signature, typewriter. The original and both copies must contain the following:
>
> (a) the name, address and age of the ultimate user for whom the substance is intended, or, if the ultimate user is an animal, the species of such animal and the name and address of the owner or person in custody of such animal;"

P.H.L. § 3333(4):

> "4. The endorsed original prescription shall be retained by the proprietor of the pharmacy for a period of five years. The endorsed copy of such prescription shall be filed with the department by not later than the fifteenth day of the next month following the month in which the substance was delivered."

Other possibly relevant portions of Article 33 of the New York Public Health Law are set forth in appendix "D" to Appellant's Jurisdictional Statement.

Questions Presented

Appellant has raised two issues in its Jurisdictional Statement:

1. Did the Court below err in finding that plaintiffs have standing to sue or that they had presented a real case or controversy? (Jurisdictional Statement, p. 11)

2. Where the statute involves a fundamental right of privacy, did the federal court below err by reviewing a legislative finding of need with the view toward determining whether that legislative purpose was being sought by unconstitutional means? (Jurisdictional Statement, p. 16)

Statement of Case

This is an action for declaratory and injunctive relief to invalidate a state statute which requires all physicians, when prescribing a Schedule II drug (P.H.L. § 3306), to do so on a triplicate form, a copy of which must contain the name of the patient and must be filed with and computerized by the State Department of Health. The challenge is to the systematic collection and filing of information of a most confidential nature and to the massive breach by the state of the confidentiality of the doctor-patient relationship.

Plaintiffs Roe, et al., originally moved by order to show cause on March 29, 1973 in the Southern District of New York to prevent the implementation of the law. Immediately thereafter, plaintiff-intervenors Patient, et al., were granted leave to intervene and their action was consolidated into the initial action. On April 6, 1973 a single judge, Robert L. Carter, dismissed the

complaint based on a finding that the complaint failed to raise a substantial federal question. (357 F.Supp. 1217 (1973))

Appeal was taken to the Second Circuit Court of Appeals. There Judge Friendly, with Judges Hays and Jameson concurring, reversed Judge Carter, found that the complaint raised a substantial federal question, and remanded for consideration by a three-judge court. (480 F.2d 102 (1973))

A three-judge court consisting of Judges Feinberg, Wyatt and Carter was then convened and heard oral argument on Appellees' motion for a preliminary injunction and Appellant's renewed motion to dismiss. On August 23, 1973 it denied both motions. (364 F.Supp. 536 (1973))

The case was tried in December 1974 before the three judges, and in August 1975 that court found that the statute was unconstitutional and it enjoined further centralized reporting and filing of patient names.

Appellant, in October 1975, applied to Mr. Justice Marshall of this Court for a stay of the lower court order pending appeal. Reply papers were submitted by Appellees. Justice Marshall heard oral argument of all counsel and on October 28, 1975, in a written opinion, denied Appellant's application for a stay. A copy of that opinion is attached hereto as Appendix "A."

Lower Court Ruling

The Facts.

The three-judge court, in an opinion by Judge Carter

a copy of which is attached to the Appellant's Jurisdictional Statement, found that physicians prescribing Schedule II drugs were required to centrally file all such prescriptions -- including the name of the patient -- with the State Department of Health. The Department of Health took the approximately 100,000 such prescription forms received each month and, with the help of nine clerks and numerous personnel, computerized all of the names.* The Department's intended use of this material was (1) to identify persons using the same name who go from doctor to doctor or (2) to uncover those receiving more than a 30-day supply of drugs each month.**

The court found that this system had turned up <u>two</u> names over a period of one and one-half years:

> "Two such names have been discovered since the computerized program has been in operation. Both were referred to the BNC [Bureau of Narcotic Control] for investigation. In one case, the investigation disclosed a bona fide doctor-patient relationship, and in the other the investigation was still open when all evidentiary data was submitted for our consideration." (Opinion, p. 5a.)

The court found that the plaintiff-patients, upon learning of the new system, had substantially changed their pattern of medically-indicated drug use to their medical detriment. One parent had taken her child off a useful drug, which resulted

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* Opinion, p. 4a

** Opinion, p. (5a)

in reducing the child's effectiveness in school. Another suffered continuing fears of stigmatization as a drug abuser. Still another had stopped drug use, had been subject to physical suffering, and had been forced to resume use. Another patient went out of state to avoid the system.*

Four doctors testified that the system had an adverse effect on patients. One doctor refused to prescribe Schedule II drugs entirely, requiring patients to use drugs which were admittedly less effective.

> "All [doctors] testified that they felt obligated to advise their patients or a responsible member of their family about the state prescription program for Schedule II drugs and reported a reaction of shock, fear and concern on the part of their patients on learning that their names would be sent to Albany and put on a computer." (Opinion, p. 7a)

<u>The Holding</u>.

The Court was very much aware of the state's concern with drug use but found that the state program was unnecessarily sweeping:

> "Concededly the state effort to control drug abuse and to prevent illicit trafficking in dangerous drugs fosters a legitimate state purpose, and ordinarily we would be reluctant to interfere. The regulatory scheme, however, has a needlessly broad sweep." (Opinion, p. 11a)

Pointing out that prescriptions are written on serially numbered

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* Opinion, 6a

forms, the court concluded: "Having the name of the person receiving the drugs on the state's forms adds nothing." (Opinion, 11a)

Accordingly, the court found that the reporting requirement constituted "an unconstitutional interference with the plaintiffs' right of privacy . . ." (Opinion, 13a)

ARGUMENT

I

THE ISSUES OF LAW HAVE BEEN THOROUGHLY EXAMINED BY THE FEDERAL COURTS BELOW AND THE QUESTIONS RAISED ARE ADDRESSED TO THE SUFFICIENCY OF THE RECORD

The Appellant's Jurisdictional Statement attempts to imply that the court below gave standing to hypothetical plaintiffs and then applied new law on which to base relief. Nothing could be further from the truth.

In fact, the several courts below again and again demanded that these plaintiffs show injury and address themselves to the state need for the information sought. Judge Carter originally dismissed the complaint (347 F.Supp. 1217) on the basis of premature conclusions regarding state need and plaintiffs' injury -- conclusions arrived at before plaintiffs had had an opportunity to submit proof on the merits. Judge Friendly, in his opinion in the Second Circuit reinstating the complaint (480 F.2d 102), noted that the district court "was not entitled to dismiss the complaint on the basis of the State's assertions . . ." without "further exploration of the degree of need for central filing including

patients' names on the one hand, and the adequacy of the provisions to protect against malicious or careless disclosure on the other." 480 F.2d at 109. Judge Friendly emphasized throughout his opinion the plaintiff's burden of showing injury and of showing that that injury outweighed the state need. Both of these courts emphasized that plaintiffs must make a strong factual showing.

The requirement of proof, rather than "ingenuous pleadings,"* was again emphasized by the three-judge court when it denied plaintiffs' motion for a preliminary injunction. (364 F.Supp. 536) Again, the court required a showing, not made at that time, of damage to the plaintiffs resulting from the state's program. Absent such a showing, the court denied plaintiffs' request for relief.

Only after trial, after hearing patients and doctors, after examining voluminous depositions (submitted as part of the trial) relating to the need for, the use of, and the effect of the system, did the court below reach any conclusion favorable to the plaintiffs. After these findings of fact, set forth in detail in its opinion -- findings on the degree of need, findings on the degree of plaintiffs' damage, findings on the utility of the system -- did the court below find that the state had created a bludgeon to do the work of a scalpel. The court below rejected every invitation to apply broad, new principles of law, and placed the burden on these plaintiffs of demonstrating that the law as established by this Court when applied to the facts here compelled relief.

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* Appellant in his Jurisdictional Statement (pp. 15,20) relies upon United States v. SCRAP, 412 U.S. 669, 688 (1973) where this Court, in dicta, indicated that "ingenuous pleadings" alone cannot give standing. Appellant's implication that plaintiffs here are relying upon such pleadings is totally erroneous, as demonstrated infra.

The Appellant here does not so much challenge the legal conclusions of the court below but rather the factual conclusions, principally whether these plaintiffs were in fact injured. But the court below did not deal abstractly with this question. It took testimony, saw and heard plaintiff-patients and doctors. The court found, as a matter of fact, from the record after trial, that there was injury to the plaintiffs and that the state had alternative means to regulate unlawful conduct without subjecting every patient receiving medically-indicated drugs to state scrutiny. These were the court's findings. Having made these findings, the court then applied the law as prescribed by this Court. The Appellant's Jurisdictional Statement does not point to any ruling of this Court ignored or misapplied by the court below. Rather, the Appellant excepts to the conclusions of fact which the court below drew from the trial record. Appellant raises its exceptions through two issues set forth in its Jurisdictional Statement. The first is whether these plaintiffs had standing; the second is whether the court below could properly review the legislative determination that this system fulfilled a need and was thus permissible. Neither of these issues merits plenary consideration by this Court.

II

THE FINDING OF STANDING IS WELL WITHIN THE PAST HOLDINGS OF THIS COURT

Justice Marshall, upon denying a stay in this case,

and referring to the court below, wrote:

> "Likewise, the court's conclusion that respondents had standing seems in accord with the liberal standing decisions of this court."

Appellant's standing argument relies upon the assertion that the plaintiff-patients have simply asserted fears of consequences which have not happened and that those fears alone do not constitute a basis for standing. Appellant relies for this argument on the holding of Laird v. Tatum, 408 U.S. 1, 13-14 (1972) where the plaintiffs had been the subject of lawful public surveillance but had suffered no injury nor changed their behavior at all. Appellant also relies on the dismissal, in California Bankers Ass'n v. Schultz, 416 U.S. 21, 56-57 (1973), of a claim by the ACLU on behalf of its members that those members had a right not to have a bank keep records of their bank transactions for fear that the records might discourage conduct. In both Laird and Schultz the plaintiffs were simply members of the general public who could show no injury or change of conduct on their part in response to government conduct. These cases are readily distinguishable from the case at bar where proof at trial showed that the plaintiff-patients had in fact altered the medical treatment that they received. Additionally, doctor-plaintiffs had stopped prescribing the drugs in question; other doctors made adjustments in their practice to compensate for the shock or anxiety of patients and one doctor had actually stopped prescribing the drugs in question.

Appellant relies further on dicta in United States v. SCRAP, 412 U.S. 669, 688 (1973) which stated that imagined circumstances do not give a plaintiff standing.* But these plaintiffs have not "imagined circumstances." The court below found definite changed medical practice. Furthermore, in SCRAP this Court sustained a District Court holding that an environmental group did have standing, noting that they contended

> "their pleadings sufficiently alleged that they were 'adversely affected' or 'aggrieved' . . . and they point specifically to the allegations that their members used the forests, streams, mountains, and other resources in the Washington metropolitan area for camping, hiking, fishing, and sightseeing, and that this use was disturbed by the adverse environmental impact caused by the nonuse of recyclable goods brought about by a rate increase on those commodities. The District Court found these allegations sufficient to withstand a motion to dismiss. We agree." 412 U.S. at 685.

The recreational use of outdoor streams was found sufficient to give standing to challenge a 2.5% surcharge increase on railroad freight rates which might lead to a reduction of recycling of waste materials. This basis of standing was far more circuitous and remote than that advanced by the plaintiffs here.

The courts below and the Second Circuit were not trouble

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* "A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action. And it is equally clear that the allegation must be true and capable of proof at trial." (412 U.S. at 688-689)

by the standing argument for a more simple reason: the regulation intrudes directly into the patients' relationships with their doctors. Judge Friendly, in an extensive opinion (480 F.2d 102 (1973)) concurred in by Judges Hays and Jameson, did not deal explicitly with the standing argument. But in his discussion of the privacy argument itself he recognized that the regulation directly affected that relationship for each of the patient-plaintiffs in this action. These patients had their names -- and drug use -- recorded and sent to Albany and filed centrally for random review by the state. Their private ailments as referred to by Judge Friendly at 480 F.2d 108, and their doctors' prescriptions relating to them were reported to the state. For this reason alone these plaintiffs fell well within the past standard of this Court set forth in Baker v. Carr:

> "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?" 369 U.S. 186, 204 (1962).

Do these plaintiff-appellees have a stake in the outcome here? As the many judges who have reviewed this case in the light of the applicable precedents have found, the answer is clearly "yes."

III

THE COURT BELOW APPROPRIATELY REVIEWED THE CONSTITUTIONALITY OF THE STATUTE

The Appellant next urges that the Legislature has made a finding of need for the legislation and that that need may not be reviewed by a federal court. At page 20 of the Jurisdictional Statement, the Appellant urges:

> "The Legislature determined the need for filing. Whether filing will achieve all the purposes envisioned by the Legislature is not the issue. Whether these hopes are achieved in the end does not affect the law's constitutionality. See James v. Strange, 407 U.S. 128, 133 (1972); Mourning v. Family Publications Service, Inc., 411 U.S. 356, 378 (1973).
>
> The question of the power of the Legislature is not to be confused with the scope of legislative considerations in dealing with a matter of policy. The District Court cannot indulge in a legislative judgment which it obviously did. Brotherhood of Locomotive Firemen & Enginemen v. Chicago R.I. & R.Rd. Co., 383 U.S. 128, 136 (1968); see also Cohen v. Beneficiary Finance Corp., 337 U.S. 541, 548-549 (1949).

The two cases relied upon for this position, Brotherhood, supra, and Cohen, supra, involve questions of the constitutionality of business regulation, an area self-evidently distant from the concerns of confidential information, the doctor-patient relationship, and the penumbra of privacy involved here.

Yet Appellant's Jurisdictional Statement is utterly devoid of any suggestion why this Court should suddenly discard in this case relevant and well-established standards relating to the

constitutional right of privacy. Rather, Appellant simply asserts that the Court should automatically show the same deference to legislative judgment here as it does in cases involving the regulation of corporate derivative suits (Cohen, supra) or railroad union practices (Brotherhood, supra).

The court below, and the Second Circuit in this case, discussed in great detail the substantial body of law developed by this Court relating to the right of privacy,* and properly applied that body of law to the case.

In Griswold v. Connecticut, 381 U.S. 479 (1965), this Court set forth the standard that in matters that are of a private nature the state may interfere with the individual's right of privacy only where it can show a compelling state interest. The means used must be:

> "necessary and not merely rationally related to the accomplishment of a permissible state policy." 381 U.S. at 497.

In subsequent cases involving doctors and patients, Eisenstadt v. Baird, 405 U.S. 438 (1972), Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), this Court has recognized that the area of medical treatment and private

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* The lower court cited in its opinion (p. 8a) a string of cases going back 80 years: Union Pacific R.R. Co. v. Botsford, 141 U.S. 250 (1891); Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Kovacs v. Cooper, 336 U.S. 77 (1949); Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); Katz v. United States, 389 U.S. 347 (1967); Stanley v. Georgia, 394 U.S. 557 (1969); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

ailments is one that is most private. In the doctor-patient relationship, the patient has a strong expectation of privacy and that expectation is entitled to the most comprehensive protection.*

All of the courts below, including especially the three-judge court which considered the facts at trial, weighed carefully what they recognized to be "powerful arguments" of the state, 480 F.2d at 108, or a "legitimate state purpose" (Opinion of the three-judge court at 11a), but they also recognized that the state's power to regulate had to be scrutinized within the constitutional bounds of the right of privacy.**

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* In Doe this Court spoke of "the [patient's] right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it [410 U.S. at 197]. As the court below stated: "Justice Douglas had described the expectation of privacy in the doctor-patient relationship as being exceeded only by that expectation in the relationship of a penitent to his priest." 410 U.S. at 219 (Opinion, 9a)

** Judge Friendly gave framework to the case by citing the words of Justice Harlan in his dissent in Poe v. Ullman, 367 U.S. 497, 543 (1961):

> "the liberty guaranteed by the due process clause 'is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particular careful scrutiny of the state needs asserted to justify their abridgement.'" 480 F.2d at 108.

In view of these holdings and the careful scrutiny which this Court has given to statutes regulating the doctor-patient relationship, it is at best bizarre for the Appellant to insist that the holdings in Brotherhood and Cohen, supra, relating to economic regulation, foreclose scrutiny of the statute in the instant case.

Furthermore, the court below was well within the most solid traditions of the law when it relied upon the well-established doctrine that regulation which invades areas of personal freedom must be narrowly drawn. N.A.A.C.P. v. Alabama, 377 U.S. 288, 307 (1964); Erznoznik v. City of Jacksonville, 95 S.Ct. 2268 (1975); Shelton v. Tucker, 364 U.S. 479, 488 (1960). The court pointed to this Court's standard in N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963) that where fundamental rights are involved, "precision of regulating must be the touchstone," a rule supported in the privacy area in Griswold, supra, which held that a regulation that infringes on the right to privacy must be necessary, and no more sweeping than required by that necessity.

This is precisely the tradition invoked by the lower court where it found that:

> "The regulatory scheme, however, has a needlessly broad sweep . . . Having the name of the person receiving the drugs on the state's form adds nothing." (Opinion, 11a)

and

> "The diminution of a constitutionally guaranteed freedom is too great a price to pay for such a small governmental yield." (Opinion, 11a)

In summary, there can be no doubt that a federal court may review a state statute which interferes with the doctor-patient relationship to test the constitutionality of that statute. The court below took testimony and reviewed the statute within the well-established standards of this Court. The questions raised by the Appellant therefore do not require the plenary consideration of this Court.

Conclusion

Based on the careful scrutiny of the court below, and the nature of the questions raised on this appeal, it is respectfully moved that this Court affirm the judgment below.

Dated: New York, New York
February 4, 1976

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APPENDIX

Appendix A, Opinion of Mr. Justice Marshall Denying Appellant's Application for Stay, October 28, 1975 (96 S.Ct. 164)

SUPREME COURT OF THE UNITED STATES

No A-368

Robert P. Whalen, Commissioner of Health of New York, Appellant, v. Richard Roe, an infant by Robert Roe, his parent, et al.	Application for Stay.

[October 28, 1975]

MR. JUSTICE MARSHALL, Circuit Justice.

This is an application for a stay of the judgment of a three-judge court sitting in the Southern District of New York. The applicant, the Commissioner of Health of the State of New York, has been enjoined by the three-judge court from enforcing certain provisions of New York's Public Health Law (the Law). Respondents are various physicians, organizations of physicians, and patients in the State of New York who successfully brought suit to have those provisions declared unconstitutional.

The provisions at stake are those parts of §§ 3331 (6), 3332 (2)(a), and 3334 (4) of the Law that require the name and address of each patient receiving a Schedule II controlled substance to be reported to the applicant. Schedule II drugs are those that have a high potential for abuse, but also have an accepted medical use. They include opiates and amphetamines. Under the state law, a doctor prescribing a Schedule II drug does so on a special serially numbered triplicate prescription form. One copy is retained by the doctor, a second goes to the pharmacist (if applicable), and the last copy goes to the applicant, who transfers the data, including the name

and address of the patient, from the prescription to a centralized computer file.

Respondents brought this action shortly after the effective date of the computerization program, alleging violations of their constitutional rights under 42 U. S. C. § 1983 and grounding jurisdiction on 28 U. S. C. § 1343 (3). Specifically, respondents claimed that mandatory disclosure of the name of a patient receiving Schedule II drugs violated the patient's right of privacy and interfered with the doctor's right to prescribe treatment for his patient solely on the basis of medical considerations. A three-judge court was convened. *Roe* v. *Ingraham*, 480 F. 2d 102 (CA2 1973).

At trial, various respondents testified that they were inhibited from using or prescribing Schedule II drugs they otherwise found beneficial because of a reluctance to disclose their or their patients' identities to the State. While questioning respondents' standing to sue, the State asserted that knowledge of patients' names was necessary to enable the computer system to detect drug abuse. When put to its proof by respondents, however, the State eventually conceded that the names and addresses of patients were useful in detecting only one abuse: patients who go from doctor to doctor (using the same name on each visit) in order to obtain an excess supply of drugs. Thereupon respondents showed that in 15 months of operation the computer system had located only one suspected "doctor-shopper" while processing over 125,000 prescriptions per month. Thus respondents contended that the centralization of patients' names and addresses served no compelling state interest sufficient to offset the asserted invasion of privacy.

The three-judge court accepted respondents' arguments. The court read our decisions in *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Doe* v. *Bolton*, 410 U. S. 179 (1973), as placing the doctor-patient relationship among those zones of privacy accorded constitutional protection.

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While noting that *Roe* and *Doe* concerned the most intimate of personal relations, sexual intimacy and the decision to bear a child, the court refused to hold the doctor-patient relationship constitutionally protected only when matters of childbearing were at stake. Rather, it noted the intimate nature of a patient's concern about his bodily ills and the medication he takes, and held that these matters too are protected by the constitutional right to privacy. While reaching this conclusion primarily on the basis of *Roe* and *Doe*, the court drew some support from the concurring and dissenting opinions in *California Bankers Assn.* v. *Shultz*, 416 U. S. 21, 78, 79, 91, 93 (1974), which it read as indicating that a majority of this Court would accord constitutional protection, at least against a wholesale reporting requirement, to all "intimate areas of an individual's personal affairs." *Id.*, at 78 (POWELL, J., concurring). Upon finding that respondents had a protected privacy interest in the medication they received, the court balanced that interest against the State's need for patient names, and concluded that, with one suspect uncovered over 15 months, the need shown was ephemeral. "The diminution of a constitutionally guaranteed freedom is too great a price to pay for such a small governmental yield." *Roe* v. *Ingraham*, slip op., at 16 (footnote omitted).

Finding those portions of the Law that demanded disclosure of patients' names and addresses to the State to be unconstitutional on the facts, the court enjoined the State from enforcing those provisions and from accepting for filing prescriptions or other documents disclosing the identities of patients receiving Schedule II drugs. The court also ordered the destruction of any name-bearing prescription forms in the State's possession and the expungement of names from all computer records. The court stayed the destruction and expungement order pending disposition of the case by this Court; it refused,

however, to stay its declaration of unconstitutionality and its injunction against enforcement of the provisions and acceptance of incoming prescriptions.

Thus the application for stay now before me concerns only those matters the District Court refused to stay. The principles that govern a Circuit Justice's in-chambers review of stay applications are well known. A single Justice will grant a stay only in extraordinary circumstances. Certainly the judgment of the lower court, which has considered the matter at length and close at hand, and has found against the applicant both on the merits and on the need for a stay, is presumptively correct. To prevail here the applicant must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal.

MR. JUSTICE POWELL has succinctly stated the considerations pertinent to evaluating these two factors:

> "As a threshold consideration, Justices of this Court have consistently required that there be a reasonable probability that four members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. See *Mahan* v. *Howell*, 404 U. S. 1201, 1202; *Organized Village of Kake* v. *Egan*, 80 S. Ct. 33, 4 L. Ed. 2d 34 (1959). Of equal importance in cases presented on direct appeal—where we lack the discretionary power to refuse to decide the merits—is the related question whether five Justices are likely to conclude that the case was erroneously decided below. Justices have also weighed heavily the fact that the lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim." *Graves* v. *Barnes*, 405 U. S. 1201, 1203–1204 (1972) (POWELL, J., in chambers).

See also *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 409 U. S. 1207, 1218 (1972) (BURGER, C. J., in chambers); *Railway Express Agency* v. *United States*, 82 S. Ct. 466, 7 L. Ed. 432 (1962) (Harlan, J., in chambers); *United Fuel Gas Co.* v. *Public Service Comm'n*, 278 U. S. 322, 326 (1929).

Applying these standards to the application before me, I conclude a stay should not be granted. The three-judge court gave careful consideration to applicant's motion for a stay and, indeed, granted one insofar as it deemed necessary to prevent irreparable harm to applicant's interests. Applicant has shown nothing to persuade me the lower court erred. If applicant's position is sustained on appeal, all the data it is precluded from processing by the District Court's order will be readily available from the State's doctors and pharmacists, who are required by law to retain the complete prescription form for five years. The information now denied the State's computers can thus be located and tabulated at a later date. While the State may suffer delay in the complete implementation of its computerization program, delay alone is not, on these facts, irreparable injury.

I conclude that applicant would suffer no irreparable injury if a stay is denied. This conclusion necessarily decides the application and renders unnecessary consideration of the possibility, since this case involves an appeal as of right, that applicant will be able to convince five Justices to reverse the three-judge court. I do note, however, that the right to privacy is a sensitive and developing area of the law and that the three-judge court did not apply it in a manner plainly inconsistent with our decisions. Likewise, the court's conclusion that respondents had standing seems in accord with the liberal standing decisions of this Court. Of course, this conclusion and my denial of a stay on the papers now be-

fore me is not to be taken as a reflection of my views on the merits of this case, or as an indication of the ultimate disposition of the case in this Court.

The application is denied.